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ABSTRACT

Section 1983 of the Civil Rights Act, providing for legal action to redress deprivation of constitutional rights by agencies of the state, has become a popular medium for remediation of alleged substantive and procedural wrongs by school officials. The success of Section 1983 actions against public schools has led to attempts to extend such actionable status to nonpublic schools. Two theories were proposed by which private action was deemed to constitute state action: state entanglement (predicated on state aid, regulation, and tax exemption of private schools) and the state function theory (whereby state action is present when private groups perform a governmental function). Both, however, were rejected by the court in "Rendell-Baker vs. Kohn," which defined state function narrowly as those functions traditionally held to be the exclusive prerogative of the state. In "Bob Jones University vs. United States," however, the court upheld denial of tax exemption to private educational institutions for racial discrimination in admissions, therefore implying an interdependence between government and private schools. But withholding a government benefit where fundamental public policy is at stake is not necessarily tantamount to attributing state function to the school. The greatest concern in applying Section 1983 to nonpublic schools is that it imposes the same substantive and procedural standards on public and private schools alike, thereby eviscerating the traditional concept of pluralism in American education. (TE)

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Private Schools' Tax Exempt Status and Application of Section 1983

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The evolutionary adaptation of law to new situations is nowhere better illustrated than in the history of Section 1983 of the Civil Rights Act. Originally enacted in 1871 as a federal attempt to counteract state inaction toward terrorism of blacks, Section 1983 stated:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.[1]

Early interpretation of Section 1983 exhibited a restrictive judicial attitude dedicated more to the preservation of states' rights than protection of individual rights.[2] The vacuum created by an apparent

1. 42 U.S.C. § 1983 (1976).
2. *Developments in the Law: Section 1983 and Federalism*, 90 HARV. L. REV. 1133-1161 (1977).

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judicial insouciance was filled by a proliferation of state Jim Crow laws that effectively disenfranchised blacks and halted their social, economic and political advancement. A more sympathetic judicial treatment of Section 1983 during the depression years with some damage awards against government officials who, under color of state law, prevented blacks from voting nonetheless produced only 280 Section 1983 suits being filed in federal courts prior to 1960.[3] The extent of the civil rights litigation explosion is evidenced by the filing of 13,000 Section 1983 suits in 1980 alone.[4]

Because of the nature of public schools as agencies of state governments, Section 1983 actions became a frequent and popular media to remediate alleged substantive and procedural wrongs. In *Wood v. Strickland*[5] the United States Supreme Court advanced both an objective and subjective test to determine liability for school officials who violated the constitutional rights of students. In *Carey v. Piphus*[6] the Court required that there could be no compensatory damages against school officials under Section 1983 for procedural violation unless plaintiffs could prove actual damages. Numerous federal and state cases have addressed a myriad variety of problems pertaining to public school teacher and student rights under Section 1983.[7] The ruling in *Maine v. Thibotout*[8] that Section 1983 included not only civil rights laws, but any federal law, has generated considerable litigation within the public sector regarding the interaction between Section 1983 and federal and state statutes protecting classes of persons based on such categories as age, sex, race, religion, and handicap.[9]

The popularity of Section 1983 as a vehicle to litigate alleged injustices can be attributed to several procedural advantages of that section over other statutes which can be the basis for a civil rights claim.

(1) Section 1983 contains no statute of limitation of its own so federal courts look to state law for limitations on similar actions in a state forum. Although statutes of limitation will vary from one

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3. Cambron-McCabe, *School District Liability*, 10 NOLPE SCH. L.J. 99, 100 (1982).
4. Annual Report of the Director of the Administrative Office of the United States Courts (1980).
5. 420 U.S. 308 (1975).
6. 435 U.S. 247 (1978).
7. *E.g.*, Stoddard v. School Dist. No. 1, 590 F.2d 829 (10th Cir. 1979).
8. 448 U.S. 1 (1980); *See also* District No. 1, Weston Cty. v. Holso, 584 P.2d 1009 (Wyo. 1978); Kingsville Indep. School Dist. v. Cooper, 611 F.2d 1109 (5th Cir. 1980); Doe v. Renfrow, 631 F.2d 91 (7th Cir. 1980), *cert. denied*, 101 S. Ct. 301 5 (1981).
9. *See*, McCroan v. Bailey, 543 F. Supp. 1201 (S.D. Ga. 1982); Hadley v. Moffat Cty. School Dist., 641 P.2d 284 (Colo. Ct. App. 1981); Meyerson v. State of Arizona, 526 F. Supp. 129 (D. Ariz. 1981).

state to another[10] they are invariably longer than a Title VII action where a complaint must be filed with the EEOC within 180 days and if EEOC has recognized a state or local "deferral agency" the complaint must be filed with the deferral agency within 240 days.[11]

(2) A Section 1983 action does not require exhaustion of administrative remedies[12] whereas a Title VII would require such exhaustion of remedies.[13]

(3) Section 1983 allows greater remedies in some situations. Section 1983 permits compensatory and punitive damages as well as equitable relief[14] whereas Title VII is explicitly limited to two years back pay, injunctive relief, other appropriate injunctive relief and attorney's fees.[15]

(4) Section 1983 has fewer procedural requirements than exist under other remedial statutes. Although a Title VII claim can be supported by allegations of "disproportionate impact"[16] rather than the discriminatory purpose required under Section 1983,[17] Title VII requires filing of a claim within 180 days, submitting to reconciliation by EEOC and receiving a right to sue letter before proceeding in federal court.[18] Under Title IX some jurisdictions impose a program-specific requirement before a sex discrimination claim can be entertained.[19]

It was probably inevitable that success of Section 1983 actions against public schools should have led to attempts to extend Sections 1983 to nonpublic schools. In *Bright v. Isenbarger*,[20] a federal district court categorically rejected the use of Section 1983 as a remedy for reinstatement by a student expelled from a Catholic school. The court supported its conclusion by observing that the United States Supreme

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10. *E.g.*, Beard v. Stephens, 372 F.2d 685 (5th Cir. 1967) (6 years); Beyer v. Werner, 299 F. Supp. 967 (D.C.N.Y. 1969) (3 years); Funk v. Cable, 251 F. Supp. 598 (D.C. Pa. 1966) (2 years).

11. 42 U.S.C. § 2000-e5(b), (e).

12. McNeese v. Board of Educ., 373 U.S. 676 (1968).

13. Rohler v. TRW Inc., 576 F.2d 1260 (7th Cir. 1978).

14. Harkless v. Sweeney Indep. School Dist., 427 F.2d 319 (5th Cir. 1970); Batista v. Weir, 340 F.2d 74 (3d Cir. 1965).

15. 42 U.S.C. § 2000e-5(g). However Title VII is available against any local, state or federal employer whereas only injunctions can be secured under Section 1983 against state employers unless the eleventh amendment immunity is waived and no action can be brought against the federal government because of the state action requirement.

16. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

17. Personnel Adm'r v. Feeney, 442 U.S. 256 (1979).

18. 42 U.S.C. § 2000e-5(c), (e).

19. Othen v. Ann Arbor School Bd., 507 F. Supp. 1376 (E.D. Mich. 1981); University of Richmond v. Bell, 543 F. Supp. 321 (E.D. Va. 1982); *Contra*, Grove City College v. Harris, 500 F. Supp. 253 (W.D. Pa. 1980), *aff'd*, 687 F.2d 684 (3d Cir. 1982).

20. 314 F. Supp. 1382 (N.D. Ind. 1970).

Court had already affirmed the pluralistic nature of our society including the methods of education[21] and that there was not significant involvement between the school and the state. The court noted that "almost everything we do is in part the product of or is facilitated by some State action" but Section 1983 cannot be invoked as a remedy unless the state and nonpublic school involvement insinuates the state "into a position of interdependence with the school [so] that it must be recognized as a point participant in the challenged activity."[22] The two elements of state-school involvement, general state supervision of the quality of education and property tax exemption, were held not to implicate the state with the school's management functions since control of educational quality and availability of tax exempt status apply to a broad range of nonprofit organizations. The *Bright* court considered state action under Section 1983 to be identical in scope to state action under the fourteenth amendment; as part of its dicta the court observed that almost all applications of the fourteenth amendment to private conduct had involved an attack upon private racial discriminations and there were no allegations of racial discrimination in the complaint.

In *Huff v. Notre Dame High School*[23] a federal district court refused to permit Section 1983 to be used to impose constitutional procedural due process standards upon a nonpublic school in a case involving a student expulsion. The court considered two theories by which private action was deemed to constitute state action: state entanglement theory and the state function theory.

The state entanglement theory was supported by claims that defendant private school received aid from various levels of government and that the school was regulated by state and local officials. The court dismissed financial aid as a basis for entanglement because only 1.59 percent of the school's budget came from services, equipment and materials from various governmental sources. The court specifically rejected tax exemption as a form of entanglement because tax exemption does not "dictate or influence the administration of [school] affairs."[24] State and local regulatory schemes, such as qualification of teachers and fire codes, were rejected because the state or local government was only exercising its legitimate interest in protecting children.

The state function theory, with its claim "that state action is present when a private individual or group performs a function normally

21. Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).
22. *See, supra* note 20 at 1384.
23. 456 F. Supp. 1145 (D. Conn. 1978).
24. *Id.* at 1148.

associated with governmental activity,"[25] was likewise disposed of by the *Huff* court. The court made two interesting observations in disposing of the state function argument: that first amendment establishment clause problems might develop if a church-sponsored private school was deemed to be the state and that if all private schools were deemed to be the state the difficult problem of aid to parochial schools would not exist.[26]

The United States Supreme Court has recently addressed the relationship of Section 1983 to a nonprofit, private school in *Rendell-Baker v. Kohn*.[27] *Rendell-Baker* involved five teachers and one vocational counselor at a private school for maladjusted high school students who alleged that they were discharged as a result of exercising their first amendment rights of free speech.[28] The sole issue before the Court was whether defendant school acted under color of state law so as to be subject to Section 1983. Virtually all of the students in defendant school were referrals from public school districts and the state drug rehabilitation division who were not able to handle the drug, alcohol or behavioral problems of the students. State and federal funds accounted for at least 90 percent of defendant's operating budget. Eligibility for state funding required compliance with a variety of regulations common to all schools such recordkeeping, student-teacher ratios, maintenance of job descriptions and written statements describing personnel standards and procedures. However, except for requirements such as equal employment opportunity and state approval of initital hiring decisions to insure compliance with state qualifications, defendant school conducted the actual personnel interviews.

In sustaining the dismissal of plaintiffs' complaints against defendant school the Court addressed both the entanglement and state function theories. In rejecting the entanglement theory the Court observed that "the relationship between the school and its teachers and counselors is not changed because the state pays the tuition of the students."[29] The Court further observed that "the decisions to discharge the petitioners were not compelled or even influenced by any state regulation."[30] The absence of extensive personnel regulations commensurate with the extensive regulations in other areas and the requirement of approval only

25. *Id.* at 1149.
26. *Id.* at 1150.
27. 102 S. Ct. 2764 (1982).
28. Plaintiff vocational counselor was allegedly discharged after petitioning the school's board for greater responsibilities for the student staff counsel and the five teachers were dismissed after their letter to the editor was printed protesting the school's prohibition on picketing.
29. *See, supra* note 27 at 2771.
30. *Id.* at 2772.

of persons hired as vocational counselors were "not sufficient to make a decision to discharge, made by private management, state action."[31]

With regard to plaintiff's argument of public function the Court declared that the question is not whether a private group serves a public function but "whether the function performed has been traditionally the *exclusive* prerogative of the State."[32] Since the state of Massachusetts had not sought to make the education of maladjusted high school students an exclusive state function there could be no state action.

The court also disposed of a final plaintiffs' argument that a symbiotic relationship existed between defendant and the state similar to the relationship in *Burton v. Wilmington Parking Authority*[33] where the refusal of a restaurant located in a public parking garage to serve Negroes constituted state action. The restaurant's argument that it would lose profits if it did not discriminate was seen as evidence that the state profited from the restaurant's discriminatory actions and the state would thus be viewed as also discriminatory. The Court concluded in *Rendell-Baker* that "the school's fiscal relationship with the State is not different from that of many contractors performing services for the government."[34]

The *Rendell-Baker* Court left open several questions that it did not have to answer. Since state funds were used to pay student tuition, might the result have been different if students rather than faculty had been dismissed and then sued under Section 1983? If defendant private school had violated specific state regulations regarding permissable methods of discipline for maladjusted juveniles by utilizing a form of discipline specifically prohibited would such action support a Section 1983 action on the theory that there is "a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself?"[35] Would the result in *Rendell-Baker* have been different had the staff dismissals been accomplished on a racially discriminatory basis?[36] With very little direct guidance from the Court the answer to all three questions in the future might be "Yes."

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31. *Id.*
32. *Id.* (emphasis is that of the Court).
33. 365 U.S. 715 (1961).
34. *See, supra* note 27 at 2772.
35. *Id.* at 2765.
36. Of course, if there were charges of racial discrimination then a cause of action would probably exist under Title VII of the Civil Rights Act, but as has been noted earlier Title VII offers limited remedies that may not be acceptable to an injured plaintiff.

It may be that some of the unanswered questions in *Rendell-Baker* may have been brought into sharper focus by the recent Supreme Court decision of *Bob Jones University v. United States.*[37]

Although not a Section 1983 case *Bob Jones* offers some insights into the relationship between the federal government and private schools. In the Court's upholding of IRS denial of tax exemption to two religious educational institutions for racial discrimination in admissions or dating practices it is important to understand what *Bob Jones* did not hold. The Court's decision applied only to IRS not to state departments of revenue; presumably states would still be free to grant tax-exempt status to private schools that discriminated on racial grounds. The Court's decision was limited to denial of federal tax exemption only violation of "established public policy,"[38] in the case of *Bob Jones University*, racial discrimination; there was no indication that other forms of discrimination, such as that based on sex or religion, are elevated to the same place as race where there is "no doubt that [they] violate fundamental public policy."[39] The Court did not eliminate Free Exercise of Religion as a constitutionally permissable basis for certain kinds of discrimination;[40] any sanctions such as denial of tax exemption would be permissable as long as they "will not prevent [the] schools from observing their religious tenets."[41]

On the other hand, the *Bob Jones* Court made several points abundantly clear. At that point in time when there is no doubt that an established public policy exists on a certain subject the governmental interest is considered to be compelling and Free Exercise of Religion will be no defense to governmental sanctions. Tax exemption is not an inviolate right that cannot be denied to any educational institutions whether religious or nonreligious. The creation of fundamental public policy is not the sole prerogative of Congress and an administrative agency such as IRS can now declare public policy subject to reversal by Congress; courts, of course, have frequently declared public policy.[42]

What *Bob Jones* leaves unclear is whether violation of a fundamental public policy itself will constitute sufficient nexus for state action. The Fourth Circuit Court of Appeals in *Bob Jones* observed that tax

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37. 103 S. Ct. 2017 (1983).
38. *Id.* at 2026.
39. *Id.* at 2032.
40. One example might be restriction of women into areas of the ministry. *See, e.g.*, EEOC v. Southwestern Baptist Theological Seminary, 485 F. Supp. 255 (N.D. Tex. 1980).
41. *See, supra* note 37 at 2035.
42. *E.g.*, Brown v. Board of Educ., 349 U.S. 294 (1955) (prohibition of racial discrimination in public education).

exemption was "a kind of monetary benefit"[43] and the Supreme Court appeared to strengthen that observation by declaring that no educational institutions practicing racial discrimination "should be encouraged by having all taxpayers share in their support by way of special tax status."[44] The Court also pointedly declared that, "When the Government grants exemptions or allows deductions all taxpayers are affected; the very fact of the exemption or deduction for the donor means that other taxpayers can be said to be indirect and vacarious 'donors.' "[45]

As has been noted earlier, one of the reasons in the past for not considering tax exemption to constitute state action has been that tax exemption does not insinuate the state "into a position of interdependence with [the school so] . . . that it must be recognized as a joint participant in the challenged activity."[46] The *Bob Jones* majority appears to have altered the traditional rationale because the continuance of tax exemption is considered to make the government a "joint participant" with the objectionable racial discrimination.

If tax exemption is now viewed as an instrument to direct or alter school matters that are violative of fundamental public policy, then it would seem that an interdependence possibly does exist between the government and a private school to constitute state action. Presumably the state action nexus would apply only to thsoe areas where a fundamental public policy exists. The *Bob Jones* majority had little difficulty in finding a fundamental public policy where there was an extensive history of judicial decisions, congressional statutes and executive orders opposing racial segregation in the public sector.[47] It is by no means clear that withholding a governmental benefit such as tax exemption where a fundamental public policy is at stake is equivalent to a finding of state action to support a Section 1983 action against such a school. For example, if a state failed or refused to deny state tax exemption to racially segregated private schools would such failure or refusal amount to state involvement with the school for state action purposes? And even if state action did exist would it support a Section 1983 action only involving racial discrimination or could students or faculty at the private school also use Section 1983 to assert the full panoply of constitutional rights available to their counterparts in the public sector?

A recent federal bankruptcy case may shed some light on how fluid the concept of state action has become and how easily it can be

43. Bob Jones University v. United States, 639 F.2d 147, 152 (4th Cir. 1980).
44. *See, supra* note 37 at 2030.
45. *Id.* at 2028.
46. *See citation, supra* note 20.
47. *See, supra* note 37 at 2029-30.

circumvented. In *In re Parkman*[48] a student at a private university had been dismissed from a doctoral program because she refused to accelerate her tuition arrearage payment schedule arranged under a Chapter 13 debtor's plan. The student sought reinstatement under Section 525 of the Bankruptcy Code which prohibits "a governmental unit" from discriminating against persons based upon actions taken by her under the Bankruptcy Act. In ordering reinstatement of the student the bankruptcy judge overcame the state action requirement by declaring "where the actions of a private institution such as withholding a transcript are really tools to collect a discharged debt or a debt provided for under a plan, debtors are denied the fresh start contemplated by Congress in enacting the Bankruptcy Code."[49] If any act of Congress purporting to preempt a field, such as the Bankruptcy Code does, is equally applicable to private schools regardless of any state action requirement then it would appear that such federal laws as Section 1983, the Civil Rights Acts and the handicapped statutes would be applicable to private schools, at least to the extent that the absence of state action prevents their application today. The *Parkman* rationale would render largely irrelevant a determination whether the area at issue involves a fundamental public policy.

There is a possibility that the nature of the remedy sought will affect the applicability of state action to a private school. Withdrawal of tax exemption, however devastating that may be to the financial life of an educational institution, is significantly different in legal effect from permitting injured plaintiffs to successfully sue an institution or its individual faculty members for violations of constitutional or federal statutory rights[50] under Section 1983. If private schools and their faculties can be sued under Section 1983, will the same rules pertaining to liability and immunity for public schools likewise be imposed upon the private schools? There is no reason to believe that the qualified immunity available to government officials would not also afford similar immunity to officials of nonpublic schools. In *Wood v. Strickland*[51] the Supreme Court noted in a student discipline case that a public school official is liable

> if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action

48. 27 BANKR. REP. 460 (N.D. Ill. 1983).

49. *Id.* at 462.

50. In Maine v. Thiboutot, 448 U.S. 1 (1980) the Court determined that "and laws" embraces any statutory right raising a concern for schools whether Section 1983 can be used to assert claims under such federal acts as the Education for All Handicapped Act of 1975, Elementary and Secondary Act of 1965, Comprehensive Employment and Training Act of 1978, Family Educational Rights and Privacy Act of 1974, and many others.

51. 420 U.S. 308 (1975).

with the malicious intention to cause a deprivation of constitutional rights or other injury.[52]

On the other hand, the Court held that a governmental unit, as opposed to the officials within that unit, has no immunities or defenses to a Section 1983 action.[53] However, in *City of Newport v. Fact Concerts, Inc.*[54] the Court held that there was no justification in history or public policy for permitting punitive awards against local governments for the reasons that such damages are "in effect a windfall to a fully compensated plaintiff, and are likely accompanied by an increase in taxes or a reduction of public services for the citizens footing the bill."[55]

It could be argued though that extension of Section 1983 liability to private schools would not necessarily entitle private schools to the immunities enjoyed by the public sector. If developments within the tort liability field can be used as a meaningful barometer of comparison between public and nonpublic school areas, the partial or total abrogation of tort immunity has been somewhat parallel but for differing reasons. Public school tort liability is not infrequently limited by the amount of liability insurance coverage of the public school district,[56] the concern being that essential governmental services might be restricted or taxpayers unduly penalized by uninsured judgments. However, the reason for partial or abolition of total charitable immunity in most states has been keyed to the awareness that charities are no longer low-budget, marginal operations but are large operations with hundreds or thousands of employees.[57]

The differences between public and nonpublic schools would certainly mean that state statutes limiting tort liability for public schools or requiring public school board indemnification of employees[58] would not apply to nonpublic schools. But they should not affect nonpublic schools differently from public schools in Section 1983 actions because neither statutory nor common law immunity protect public school board members or school officials from liability in federal civil rights actions.[59]

Another concern for certain nonpublic schools would be whether Section 1983 could create rights in situations where other federal laws

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52. *Id.* at 322.

53. Owen v. City of Independence, 445 U.S. 622 (1980). Punitive damages are available against officials, Patton v. Fa Prade, 524 F.2d 863 (3d Cir. 1975).

54. 101 S. Ct. 2748 (1981).

55. *Id.* at 2760.

56. *See, e.g.*, MINN. STAT. § 466.01.

57. Foster v. Roman Catholic Diocese of Vermont, 70 A.2d 230 (Vt. 1950); Adkins v. St. Francis Hosp., 143 S.E.2d 154 (W. Va. 1965); Parker v. Port Huron Hosp. 105 N.W.2d 1 (Mich. 1960).

58. *E.g.*, ILL. REV. STAT. ch. 122, § 10-20.20.

59. McLaughlin v. Tilendis, 398 F.2d 287 (7th Cir. 1968); Luker v. Nelson, 341 F. Supp. 111 (N.D. Ill. 1972).

grant exemptions. For example, Title VII[60] and Title IX[61] each have exemptions for certain religious practices that might otherwise be considered in violation of the statutes. To date courts have consistently held that the authority of Section 1983 is jurisdictional only and it creates no new substantive rights.[62] Thus the religious exemptions would remain intact subject only to revision by Congress. Presumably, other federal or state statutes which are keyed to reception of federal or state financial assistance[63] would prohibit Section 1983 actions where relevant financial assistance is not received.

The greatest concern about the applicability of Section 1983 to nonpublic schools, however, transcends the actual mechanics of how that section applies to such schools. Regardless whether Section 1983 is held to apply if tax exemption is now sufficient nexus for state action, or if a fundamental public policy is at issue thus invoking a form of state action, or if a preemptive federal statute is at issue, the effect may well be the evisceration of the distinctions of nonpublic school education. In private education the relationship between the school and the parents of minor students or the school and students who have reached their legal age of majority or the school and faculty is generally recognized to be one of contract.[64] Contract theory has been used to sustain many ways in which private school officials have dealt with faculty and students even though similar conduct in the public sector would have faced serious due process attacks.[65] Nonpublic schools have been able to restrict such substantive rights as speech and press and to impose standards of conduct that would be impermissable in the public sector. In addition, nonpublic schools have been able to expel students using procedural standards less than the procedural due process requirements imposed upon public schools.[66] If the full panoply of rights imposed upon public schools were to be imposed also upon private schools, it would be difficult for many private schools to maintain any of their unique distinctives.

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60. 42 U.S.C. § 2000e.
61. 20 U.S.C. § 1681-86.
62. Hadley v. Moffat Cty. School Dist., 641 P.2d 284 (Colo. Ct. App. 1981); Meyerson v. Arizona, 526 F. Supp. (D. Ariz. 1981); Acosta v. University of Dist. of Columbia, 528 F. Supp. 1215 (D.D.C. 1981); Jones v. Berdsong, 530 F. Supp. 221 (D. Miss. 1980).
63. *E.g.*, 29 U.S.C. § 794 (Rehabilitation Act of 1974); 42 U.S.C. § 2000d (Title VI); 42 U.S.C. § 6101 (Age Discrimination Act of 1975).
64. *See generally*, S. PERMUTH & R. MAWDSLEY, THE LAW, THE STUDENT AND THE CATHOLIC SCHOOL (1981).
65. *See, e.g.*, Napolitano v. Princeton Univ., 186 N.J. Super. Ct. App. Div. 548, 453 A.2d 263 (1982); Aronson v. North Park College, 418 N.E.2d 776 (Ill. App. Ct. 1981); Bischoff v. Brothers of the Sacred Heart, 416 So. 2d 348 (La. Ct. App. 1982).
66. Flint v. St. Augustine H.S., 323 So. 2d 229 (La. 1975).

On the other hand it could be argued that if nonpublic schools were to be increasingly secularized by the imposition of requirements not currently applicable to nonpublic schools, then perhaps public schools should adapt a broader concept of an open forum commensurate with the secularization of private schools.[67] To subject both public and nonpublic schools to the same substantive and procedural standards eviscerates the traditional concept of pluralism in American education.[68] A negation of a frontal assault on nonpublic education by means of Section 1983 is especially critical for religious schools since the practices of such schools have been increasingly eroded by the judicially constructed doctrine of compelling interests.[69] If Section 1983 can be applied to nonpublic schools it would be questionable whether even the compelling interest doctrine would represent any protection for such schools. The possibility of application of Section 1983 to nonpublic schools represents a clear and present danger to their very existence and should cause genuine concern to those in positions of leadership in nonpublic education.

The effect of loss of tax exemption to nonpublic schools would be serious but not necessarily disastrous. Undoubtedly there would be some attempt for individual donors to use another tax exempt organization as a conduit. In addition, the school without its tax exempt status will have to manage its finances in such a way as to reduce or eliminate taxable income, much the same way a private corporation does. However, since loss of federal tax exemption would not assure compliance with whatever public policy is at issue it would seem that a certain amount of pressure may be exerted to assure compliance. Although pressure on local and state governments to tax the nonpublic school's property and income will undoubtedly be exerted, such measures would not guarantee the compliance that successful Section 1983 damage suits would. Even the most intransigent nonpublic school would eventually have to bow to the potentially staggering financial drain of repeated civil rights actions. The alternative, namely complying with whatever public policy that is at stake, may appear equally ominous since IRS may well have the authority to monitor internal school operations to assure compliance.

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67. For a discussion of the open forum concept in public schools *see* P. PIELE & S. PITT, SCHOOL LAW UPDATE—1982 1-12 (Jones, Semler eds. 1983).

68. For an excellent discussion of the necessity for genuine educational pluralism *see* PRIVATE SCHOOLS AND THE PUBLIC GOOD 19 (E. Gaffrey, Jr. ed. 1981). "The greatest degradation of poverty is the unavailability of choice."

69. States have been especially imaginative in finding compelling interest to justify state regulation. *See, e.g.*, Nebraska v. Faith Baptist Church, 301 N.W.2d 571 (Neb. 1980). For the most recent U.S. Supreme Court decision *see* Bob Jones Univ. v. United States, 103 S. Ct. 2017 (1983).